IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 09-07-2007

CORAM

THE HONOURABLE MR.JUSTICE M.JAICHANDREN

Second Appeal Nos.889 to 891 of 1996

Nisha Devi Khetan .. Appellant in all the appeals.

Versus

1.The District Collector,
Periyar District,
Office of the Collectorate,
Perundurai Road, Erode-11.

2. The Commercial Tax Officer,
Enforcement Wing,
Commercial Tax Buildings,
Brough Road, Erode. .. Respondents in all the appeals.

Prayer in S.A.No.889 of 1996: Appeal against the judgment and decree, dated 27.11.1995, made in A.S.No.161 of 1994, on the file of the Principal District Judge, Periyar District at Erode, reversing the judgment and decree, dated 29.09.1994, made in O.S.No.581 of 1993, on the file of the Principal District Munsif, Erode at Periyar District.

Prayer in S.A.No.890 of 1996: Appeal against the judgment and decree, dated 27.11.1995, made in A.S.No.162 of 1994, on the file of the Principal District Judge, Periyar District at Erode, reversing the judgment and decree, dated 29.09.1994, made in O.S.No.583 of 1993, on the file of the Principal District Munsif, Erode at Periyar District.

Prayer in S.A.No.891 of 1996: Appeal against the judgment and decree, dated 27.11.1995, made in A.S.No.163 of 1994, on the file of the Principal District Judge, Periyar District at Erode, reversing the judgment and decree, dated 29.09.1994, made in O.S.No.585 of 1993, on the file of the Principal District Munsif, Erode at Periyar District.

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For Appellant : Ms.P.T.Asha
For Respondents : Mr.A.C.Mani Bharathi
Government Advocate

COMMON JUDGMENT

These second appeals have been filed against the judgments and decrees, dated 27.11.1995, made in A.S.Nos.161, 162 and 163 of 1994, on the file of the Principal District Judge, Erode, Periyar District, reversing the judgments and decrees, dated 29.09.1994, made in O.S.Nos.581, 583 and 585 of 1993, on the file of the learned Principal District Munsif, Erode, Periyar District.

2. Inasmuch as the issues involved in all these appeals are one and the same, a common order is being passed. The plaintiff in the suits in O.S.Nos.581, 583 and 585 of 1993 is the appellant in the present second appeals. The suits have been filed by the plaintiff praying to declare the notices, dated 23.03.1993, as illegal and arbitrary, and for a mandatory injunction to direct the second defendant to release the lorries, with the consignment of 145 bags of poppy seeds, along with the relevant records that were seized.

3. The brief facts of the case, as stated by the plaintiff, are as follows:

a) The plaintiff is a dealer in poppy seeds (kasakasa) and other commodities at Calicut in Kerala State. The plaintiff used to purchase poppy seeds from Gauhati, in the State of Assam and the goods were transported to other places through lorries. Prior to 12.03.1993, the tax levied on poppy seeds, in accordance with serial No.173 of the First Schedule annexed to the Tamilnadu General Sales Tax Act, 1959, was 8% and the tax was being levied at the point of first sale in the State. From 12.03.1993, the rate of the tax was reduced to 5%. As per Section 44 of the Tamilnadu General Sales Tax Act, 1959, it was mandatory for the owner, or any person in charge of the goods vehicle to carry with him a bill of sale, or delivery note or such other documents, as may be prescribed as well as the goods vehicle record of the trip sheet. The check post officials have been empowered to inspect the goods while in transit. The plaintiff has purchased 145 bags of poppy seeds weighing 10,000 kilograms, as per Bill Nos.177, 176 and 178, dated 12.03.1993. The poppy seeds, which were the goods in transit and the subject matter of the suits, are listed in Sl.No.173 of the First Schedule of the Tamilnadu General Sales Tax Act, 1959. The goods were purchased by the plaintiff from Mahavir Trading Company, Imphal, in the State of Manipur and the said goods were arranged to be transported through Bikaner Assam Road Lines.

b) The vendor had undertaken to transport the consignment from Imphal to Gauhati and from Gauhati to Calicut, the said road lines had its Divisional Office at Erode. For various valid reasons, it was the usual

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practice of the Bikaner Assam Road Lines to unload the consignment in their Divisional office at Erode and to reload the consignment and transport the same to Calicut through a suitable carrier.

c) Under the Tamilnadu General Sales Tax Act, the poppy seeds cannot be taxed by the State of Tamilnadu, since the movement of the goods was in pursuance of an interstate sale, involving the State of Assam and the State of Kerala. The goods in question were only passing through the State of Tamil Nadu and there was no sale of the said goods in the State of Tamil Nadu.

d) On 23.03.1993, the said consignment of poppy seeds and the lorries by which, they were transported was checked at Erode by the Deputy Commercial Tax Officer, Shankari. Thereafter, show cause notices have been issued, as though the said consignments were being unloaded at Veerappan chatiram. Since the appellant had no occasion or necessity to unload the consignment at Veerappan Chatiram, the averments in the show cause notices were false.

e) The poppy seeds were being transported in the lorries bearing Registration Nos.TN J 9904, TNS 9149 and CAS 3690 and the said lorries were detained and handed over to the second defendant based on frivolous grounds. The plaintiff had come to Erode, on 24.03.1993, and had presented an objection petition in the office of the inspecting officials. However, the goods and the lorries were not released. The goods and the lorries were in the custody of the second defendant. The acts of the Commercial Tax Department was arbitrary, illegal and against the provisions of the Tamil Nadu General Sales Tax Act, 1959. Due to the detention of the goods, the plaintiff was put to hardship and heavy loss and was liable to pay a huge amount of money as hire charges. The case of the officials of the Commercial Tax Department cannot be questioned by way of an appeal or revision, as no such procedure was contemplated under the said Act. Since it is a civil right, the plaintiff has been constrained to file the suits praying for a decree of declaration, to declare the notices, dated 23.03.1993, as illegal and arbitrary and for a mandatory injunction, to direct the second respondent to release the seized lorries, along with the consignments of 145 bags of poppy seeds.

4. In the written statement filed on behalf of the defendants, it has been stated that the suits are not maintainable, in view of Section 49(2) of the Tamilnadu General Sales Tax Act, 1959. It is also not maintainable, in view of the Specific bar under Section 51(a) and (b) of the said Act. Even though there are bills, dated 12.03.1993, in favour of the plaintiff, the transactions of the plaintiff was not admitted to be genuine. The defendants were not admitting the transport practice that was being followed by the carriers of the goods. It was admitted by the defendant as true that the poppy seeds seized under Sl.Nos.173 of the First Schedule of the Act attracts single point tax. It was also said to be true that Section 43 of the Act empowers the check post officials to inspect the

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goods in transit. However, it would not be true to say that since the transaction is an interstate sale, tax cannot be levied in the State of Tamilnadu.

5. The defendants have stated that the vehicles carrying the goods in question was intercepted by the Assistant Commercial Officer, on 23.03.1993, at three different check points at Erode and it was found that the vehicles were carrying 145 bags of poppy seeds from Imphal to Erode to an undisclosed consignor at Erode with the intention of evading sales tax amount of Rs.31,263. In such circumstances, a case was registered against the drivers of the said vehicles.

6. The officials of the Commercial Tax Department had found that the goods in question were being transported without the purchase orders of the consignee. The particulars of the purchase orders placed by the consignee were not furnished in the sale bills, dated 12.03.1993. The particulars of the fleet owners and transport contractors, lorry receipt details etc., were not furnished in the sale bills. Therefore, the bonafide nature of the transportation was to be proved either by the consignor or the consignee by producing the relevant records. Show cause notices were issued. The vehicles transporting the goods were released, on 23.03.1993, after unloading the goods at the transport office. On 25.03.1993 a representation was made on behalf of Thirumala Traders, Calicut and the person who appeared, was instructed to produce a copy of the purchase order, so as to confirm the genuineness of the transaction, as Rule 35 is applicable, in order to find out whether the transaction is carried on the basis of a purchase or sale. The dealer or any other person, who is entitled to take delivery of the goods at Erode was to pay the tax, surcharge amount totalling to Rs.31,523/-, along with the compounding fees to be fixed by way of departmental proceedings. The drivers of the lorries, who had carried the goods have given a statement that they were directed to deliver the 145 bags of poppy seeds at the unregistered godown of Shri.Jagadamba Traders at Veerappan Chattiram, Erode. The departmental officials had followed the vehicles and had found that 10 bags of poppy seeds were unloaded by the drivers at the premises of Shri.Jagadamba traders of Veerappan Chattiram. On an inspection made, on 22.03.1993, in the said premises, it was found that 237 bags of poppy seeds were found to be excess stock. All the poppy seeds which were accounted for, had been purchased from the said trader, namely, Mahavir Traders, Imphal. The relevant documents had revealed that the goods were intended to be delivered at Erode. Thus, it was found that a clandestine attempt had been made by the traders of Shri.Jagadamba Traders, Erode, with the active assistance of the plaintiff to avoid payment of sales tax. The defendants, however, had stated that the case of the officials of the Commercial tax Department are bonafide and legal and therefore, the goods and the lorries cannot be released. The tax and other penal charges would amount to Rs.31,253/-. However, two times the tax amount had to be levied as compounding fees, under Section 46(1) of the Tamil Nadu General Sales Tax Act, 1959. Thus, the total amount to be paid by the plaintiff was

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Rs.93,259/-, under Section 42(8)(b) of the Tamilnadu General Sales Tax Act. The authorities were empowered to detain the goods in case of tax evasion. Any person objecting to an order, or proceedings recorded under the Act, for which an appeal has not been provided under Section 31 or 31 (a), within a period of 30 days, could file an application for revision. The plaintiff had filed the suits without exercising the proper remedies available under the Act. Hence, the plaintiff was not entitled to the relief of declaration and interim injunction. The Civil Court cannot sit on the judgment upon such lawful action by the officials of the Commercial Tax Department. However, the suits filed by the plaintiff without serving a notice under Section 80 CPC was not maintainable.

7. Based on the averments made on behalf of the plaintiff as well as the defendants, the trial Court had framed the following issues for consideration:

"1) Whether the plaintiff is entitled to the relief of declaration as prayed for?

2) Whether the plaintiff is entitled to the relief of mandatory injunction as prayed for?

3) To what other reliefs, the plaintiff is entitled to?"

8. The trial Court had come to the conclusion that the goods in question, seized by the officials of the Commercial Tax Department, were not meant to be sold in the State of Tamil Nadu. According to the documents filed in support of the claims made by the plaintiff it shows that the necessary sales tax had been paid in the State of Kerala. Further, the trial Court had found that the defendants had not shown sufficient proof to establish their claim that the goods were sold to the consignee at Erode. Since the officials concerned who had issued the notices in question, dated 22.03.1993, marked as Ex.A-2, was not an officially authorised to issue the said notice, the trial Court had come to the conclusion that the said notices dated 22.03.1993 was not in accordance with law. It was further found that the reasons stated in the show cause notices, dated 22.03.1993, were baseless and contrary to law. They were held to be invalid and unsustainable. Thus, the trial Court had decreed the suits in favour of the plaintiff.

9. Aggrieved by the judgments and decrees of the trial Court, the defendants had filed the appeals raising various grounds. Based on the averments made on behalf of the appellants therein as well as the respondent therein and based on the records available, the lower Appellate Court had framed the following issues for consideration:

"1) Whether the Civil Court has jurisdiction to entertain the suit?

2) Whether the suit is maintainable without issuing notice under Section 80 C.P.C?

3) Whether the plaintiff is entitled to the relief of declaration and injunction?"

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10. The main contention that had been raised by the defendants in the suits was that the Civil Court had no jurisdiction to entertain the suits. It was contended on behalf of the defendants in the suits that the notice issued, under Ex.A-2, in the respective suits can be challenged by the plaintiff by filing a revision before the authorities constituted under the Tamil Nadu General Sales Tax Act, 1959, and that the provisions of Section 51 of the said Act places an embargo on the Civil Court from trying such suits. However, Section 31 and 31(A) of the Tamil Nadu General Sales Tax Act, 1959, lays down the procedure for filing of an appeal before the Appellate Commissioner and Deputy Commissioner, Commercial Taxes Department. However, the said provision does not apply to the said case, since the notices, under Ex.A-2, in the respective suits had been issued for compounding the offence. Though the proper Section was not quoted in Ex.A-2, marked in the respective suits and that the evidence of D.W.1 was not clear as to the provisions under which the notices had been issued, the substance of the notices would show that the plaintiff was given an opportunity to compound the offence within the stipulated time stated therein. Therefore, it was to be held that the show cause notices, dated 23.03.1993, marked as Ex.A-2, in the respective suits had been issued under Section 46 of the Act.

11. After analysing the various decisions cited by the learned counsel appearing on behalf of the plaintiff, as well as the defendants and based on the contentions raised on their behalf, the lower Appellate court had come to the conclusion that the plaintiff had no right to challenge the proceedings issued under Section 80 of the Civil Procedure Code, 1908, by way of civil suits. The remedy for the plaintiff would be by way of filing a revision before the Deputy Commissioner under Section 33 of the TamilNadu General Sales Tax Act, 1959. It was also held by the lower Appellate Court that the question whether the order passed by the trial Court in dispensing with the notice under Section 80(2) of the Civil Procedure Code, 1908, was not germane to the present case. Thus, the lower Appellate Court had held that the plaintiff was not entitled to a decree of declaration and mandatory injunction as prayed for in the suits in O.S.Nos.581, 583 and 585 of 1993.

12. Thus the appeals before the lower Appellate Court had been allowed. Challenging the judgment and decree of the lower Appellate Court, dated 27.11.1995, made in A.S.Nos.161, 162 and 163 of 1994, the present second appeals have been filed.

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13. These second appeals have been admitted on the following substantial questions of law:

> "i) Whether the Appellate Court is correct in law in holding that the Civil Court has no jurisdiction to try the suit overlooking that the respondents have no authority to detain the lorry and seize the goods as admittedly no sale had taken place inside Tamil Nadu?
>
> ii) Whether the Lower Appellate Court is correct in law in

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coming to the conclusion that the Civil Court has no jurisdiction to try the suit?"

14. The learned counsel appearing on behalf of the appellant had submitted that the lower Appellate Court had erred in dismissing the appeals filed by plaintiff without considering the entire facts and evidence on record. The Appellate Court had given its findings without correctly appreciating the scope of the Tamil Nadu General Sales Tax Act, 1959. Further, the lower Appellate Court had wrongly reversed the judgments and decrees of the trial Court on the ground that the Civil Court has no jurisdiction as per Section 51 of the Act and that the plaintiff is entitled to file only a revision under Section 33 of the Act. Since the goods in question were on transit to the State of Kerala, no sale had taken place within the State of Tamil Nadu and therefore, the question of levying sales tax under the Tamil Nadu General Sales tax Act, 1959, does not arise. Since, Section 51 of the Act creates a bar against suits filed to set aside, or modify any assessment, and it does not apply to a suit in which a relief of declaration has been sought for. Since the impugned notice issued on behalf of the Commercial Taxes Department against the plaintiff is arbitrary and illegal and contrary to the provisions of law laid down by the Tamil Nadu General Sales Tax Act, 1959, the plaintiff is entitled to maintain the civil suits in challenging the said notices.

15. Per contra, Mr.Mani Bharathi, the standing counsel appearing on behalf of the respondents had submitted that the proceedings initiated on behalf of the Commercial Taxes Department by the defendants is valid in the eye of law, as it is in accordance with the provisions of the Tamil Nadu General Sales Tax Act, 1959. The lower Appellate Court was right in holding that a Civil Suit has been barred and that the plaintiff is not entitled to the relief of declaration as sought for by her.

16. The suits filed by plaintiff are premature, since the impugned notices challenged by the plaintiff is only in the nature of a show cause notice and that the plaintiff has efficacious alternative remedy prescribed under the provisions of the Tamil Nadu General Salex Tax Act, 1959. The lower Appellate Court is right in dismissing the suits on the ground of lack of jurisdiction. Hence, the second appeals are liable to be dismissed.

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17. On a perusal of the records available before this Court and based on the submissions made by the learned counsel appearing on behalf of the appellant, as well as the respondents, this Court is of the considered view that the lower Appellate Court is right in reversing the judgment and decree passed by the trial Court.

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18. On a perusal of the provisions of the Tamil Nadu General Sales Tax Act, 1959, it is clear that the Act provides for an efficacious remedy to the plaintiff to challenge any adverse order passed against her. In fact, the impugned notices challenged by the plaintiff relates to the payment of penalty as provided under the relevant provisions of the Act. Section 25 of the Act, reads as follows:

> "Recovery of penalty or interest - Any penalty or interest payable under this Act shall be deemed to be tax under this Act for the purposes of collection and recovery and shall be without prejudice to the institution of any proceeding for an offence under this Act, or for the recovery of the entire amount remaining unpaid under this Act."

19. Since, penalty is taken to be a component of the tax, any challenge against such penalty being imposed on the plaintiff could be by way of a revision under Section 33 of the Tamil Nadu General Sales Tax Act, 1959. Though such an alternative remedy is available, the plaintiff had come by way of filing the suits instead of the remedy provided under the Tamilnadu General Sales Tax Act, 1959. In such circumstances, the lower Appellate Court has rightly come to the conclusion that the suits are not maintainable and that the civil Court has no jurisdiction to try the suits. In such view of the matter, the second appeals are liable to be dismissed and are accordingly dismissed. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

Csh

To
1. The Principal District Judge,
Periyar District at Erode.

2. The Principal District Munsif,
Erode at Periyar District.

+ 3 CCs To M/s.Sarvabhauman Associates, SR NO.41337

+ 1 CC to the Spl. Government Pleader SR NO 41218

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